Southwestern Bell Mobile Systems

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Linda M. Hood Attorney Via Airborne

March 18, 1993

Ms. Donna Searcy Office of the Secretary Federal Communications Commission 1919 M Street, N.W. Washington, D.C. 20554 RECEIVED

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

RE: RM-8179: Filing of Comments of Southwestern Bell Mobile Systems, Inc.

Dear Ms. Searcy:

Enclosed for filing in the above referenced proceeding are the original and ten copies of the Comments of Southwestern Bell Mobile Systems, Inc., Supporting the Cellular Telecommunications Industry Association's Petition for Rulemaking. Please file these Comments among the papers in this proceeding.

Please return a file-marked copy of the Comments to me in the enclosed self-addressed stamped envelope.

Thank you for your assistance.

Very truly yours,

Enclosure

cc Mr. Michael F. Altschul (with enclosure)

17330 Preston Road Suite 100A Dallas, Texas 75252

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BEFORE THE FEDERAL COMMUNICATIONS COMMISSION WASHINGTON, D.C.

In the Matter of

Policies and Rules Pertaining to the Regulation of Cellular Carriers

RM - 8179

FEDERAL COMMUNICATIONS COMMISSION
SOURCE OF THE SECRETARY

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COMMENTS OF SOUTHWESTERN BELL MOBILE SYSTEMS, INC. SUPPORTING THE CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION'S PETITION FOR RULEMAKING

Wayne Watts Linda Hood SOUTHWESTERN BELL MOBILE SYSTEMS, INC. 17330 Preston Road, Suite 100A Dallas, Texas 75252 (214) 733-2008

Dated: March 19, 1993

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SUMMARY

Southwestern Bell Mobile Systems, Inc. ("SBMS") supports CTIA's Petition for Rulemaking and its requests that the Commission clarify both the local nature of cellular service and cellular carriers' status as non-dominant carriers. Despite conflicting statements about the status of cellular carriers, the fact remains that the Commission has never undertaken an analysis of cellular carriers' market power in interstate services, which under the Commission's classification scheme would leave cellular carriers in the non-dominant category. Because of the confusion surrounding cellular carriers' status, however, it is appropriate for the Commission to initiate a rulemaking to clarify the nondominant treatment that should be accorded cellular carriers with respect to tariff filing requirements.

Cellular carriers are appropriate candidates for streamlined regulation because they operate competitively do

jurisdiction. Where they are subject to the FCC's jurisdiction, cellular carriers should be accorded streamlined regulatory treatment, including the ability to file maximum rate tariffs without the cost support and notice requirements applicable to dominant carriers.

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION WASHINGTON, D.C.

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MAR 1 9 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	§	
	§	
Policies and Rules Pertaining	§	RM - 8179
to the Regulation of Cellular	§	
Carriers	§	

To:

The Federal Communications Commission

COMMENTS OF SOUTHWESTERN BELL MOBILE SYSTEMS, INC.

Southwestern Bell Mobile Systems, Inc. ("SBMS") submits these comments in support of the Cellular Telecommunications Industry Association's ("CTIA") Petition for Rulemaking in the above matter.

I. INTRODUCTION

The United States Court of Appeals for the District of Columbia Circuit recently invalidated the Federal Communication Commission's ("Commission") forbearance policy exempting non-dominant common carriers from the tariff filing requirements of Section 203,² and determined that all common carriers must file tariffs pursuant to that section.³ Many carriers that previously had not filed tariffs because they

²47 U.S.C. § 203.

³AT&T v. FCC, 978 F.2d 727 (D.C. Cir. 1992).

were subject to forbearance under the Commission's policy will now have to file tariffs.

In response to the court's decision, the Commission issued a Notice of Proposed Rulemaking ("NPRM") in CC Docket No. 93-36 seeking comment on its proposals to ease the existing tariff filing requirements for non-dominant carriers previously subject to forbearance. With this focus on non-dominant carriers and the reexamination of the streamlined regulation appropriate for such carriers, it is vital that the

fold explanation for this forbearance by cellular carriers is

1) the predominately local nature of cellular service, which
in many cases removes service from the Commission's
jurisdiction under the Communications Act, and 2) the widelyheld view that cellular carriers were in fact eligible for
tariff forbearance treatment by the Commission notwithstanding
some apparently conflicting language in Commission reports
regarding the status of cellular carriers as dominant or nondominant.

The description of cellular carriers as dominant or non-dominant under the Commission's regulatory scheme has been somewhat confused; nevertheless, the better reasoned conclusion is that cellular carriers are in fact currently accorded non-dominant status pursuant to the Commission's own articulated procedure for determining whether a carrier should be subject to treatment as a dominant carrier. In its First Report in the Competitive Carrier Proceeding⁶ the Commission

August 24, 1982, in the United States District Court for the District of Columbia in <u>United States v. Western Electric et al.</u>; Civil Action No. 82-0192, 552 F. Supp. 131 (D.D.C. 1982).

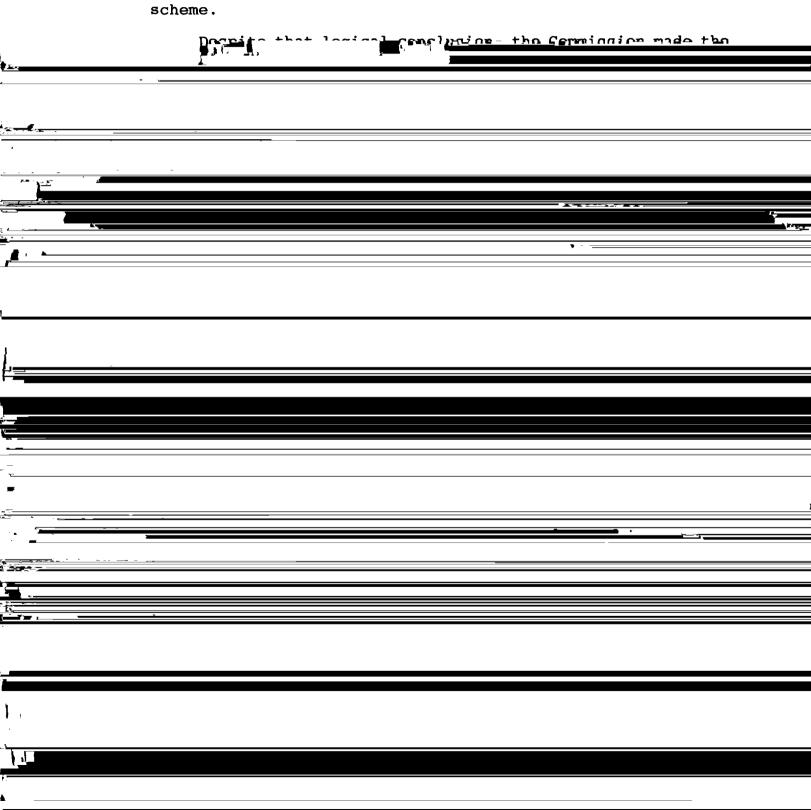
Carrier Services and Facilities Authorizations Therefor (CC Docket No. 79-252) (Competitive Carrier), Notice of Inquiry and Proposed Rulemaking, 77 FCC 2d 308 (1979) (Competitive Carrier Notice); First Report and Order, 85 FCC 2d 1 (1980) (First Report); Further Notice of Proposed Rulemaking, 84 FCC 2d 445 (1981) (Competitive Carrier Further Notice); Second Further Notice of Proposed Rulemaking, FCC No. 82-187, 47 Fed. Reg. 17,308 (1982); Second Report and Order, 91 CC 2d 59 (1982) (Second Report), recon., 93 FCC 2d 54 (1983); Third Further Notice of Proposed Rulemaking, 48 Fed. Reg. 28,292 (1983); Third Report and Order, 48 Fed. Reg. 46,791 (1983); Fourth Report and Order, 95 FCC 2d 554 (1983) (Fourth Report), vacated, AT&T v. FCC, 978 F.2d 727 (D.C. Cir.

outlined its framework for determining a carrier's status. stated that it would consider a carrier to be dominant if the carrier had market power. After determining that several carriers did qualify as dominant carriers, the Commission stated that "[a]ll other carriers will be classified as nondominant and, as such, brought within the streamlined tariff filing and facilities authorizations procedures proposed in the Notice and finalized here."7 The Commission recently reaffirmed that policy in footnote 30 of its NPRM in Docket 93-36. That the Commission's classification system is set up to default carriers whose market power has never been considered to non-dominant status is further confirmed by the Commission's Rule 61.3[t], in which a non-dominant carrier is defined as a carrier not to be found dominant. 61.3[t]. Based upon those statements, it appears that with the advent of cellular licensees, any of their interstate operations within the sphere of the Commission's authority would be categorized as non-dominant until such time, if any, as the Commission determined after analysis of the relevant market that the carriers' market power in interstate services required their reclassification as dominant. No such market

^{1992),} rehearing en banc denied, January 21, 1993; Fourth Further Notice of Proposed Rulemaking, 96 FCC 2d 922 (1984); Fifth Report and Order, 98 FCC 2d 1191 (1984) (Fifth Report), recon., 59 Rad. Reg. 2d (P&F) 543 (1985); Sixth Report and Order, 99 FCC 2d 1020 (1985) (Sixth Report), rev'd MCI Telecommunications Corp. v. FCC, 765 F.2d 1186 (D.C. Cir. 1985) (MCI v. FCC).

⁷First Report, paragraph 7.

analysis for cellular carriers has ever been performed, leading to the logical conclusion that cellular carriers are non-dominant carriers under the Commission's classification scheme.



Further support for this notion is found in the fact that footnote 41 of the Fifth Report cites to the Fourth Report in describing cellular carriers as dominant. The only statement made in the Fourth Report and Order with respect to cellular, however, is found in paragraph 40, in which the Commission states as follows: "Among the classes of carriers not heretofore considered in this Rulemaking are providers of . . . cellular mobile radio services." Nowhere in the Fourth Report, however, does the Commission find cellular carriers to be dominant or state that cellular carriers have previously been found dominant. To the contrary, the Commission notes that the matter has not been considered.

Finally, footnote 41 notwithstanding, the Commission has never sought any form of interstate tariff from the cellular industry, much less the sort of detailed tariff required of dominant carriers, and justifiably so. As CTIA notes in its

NPRM in Docket No. 93-36, therefore, cellular carriers should today still be classified as non-dominant.

Confusion persists however. In footnote 12 of the NPRM in Docket No. 93-36 the Commission states that cellular carriers have been found to be dominant and cites footnote 41 from the Fifth Report. At the same time, in footnote 30 of the NPRM the Commission states that it has consistently been the Commission's policy that a carrier is non-dominant unless the Commission has previously found it to be dominant, citing the position of the CAPS (competitive access providers), which, like cellular carriers, have never been under scrutiny with respect to their status as either dominant or non-dominant carriers. The two footnotes obviously conflict because, as previously discussed, the Commission has never undertaken the analysis necessary for it to declare cellular carriers dominant.

The Commission itself notes this confusion in an Order released February 19, 1993, in connection with CTIA's Petition, observing in paragraph 5 that "[c]ellular's status as an interstate dominant carrier is obscured by the absence of any direct examination of the competitiveness of cellular service in the interstate communications market. The Commission has classified a cellular carrier's resale of terrestrial interstate services as a non-dominant resale activity. While the Commission has concluded that cellular

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services, it did not base its conclusion on any market analysis."

Having thus identified the confusion, and believing that cellular carriers are already necessarily non-dominant by virtue of their historical treatment and the lack of any direct analysis of the cellular market, SBMS fully supports the rulemaking proposed by CTIA in order to clarify once and for all the non-dominant status of cellular carriers.

III. THE CONFUSION SHOULD BE ELIMINATED AND CELLULAR CARRIERS SHOULD NOW BE DECLARED NON-DOMINANT

In paragraph 2 of the First Report the Commission described certain non-dominant carriers as not sharing the existing telephone companies' characteristic of offering both franchise monopoly local exchange service and participation in the joint provision of the vast majority of the nation's interexchange service. Today's cellular carriers fit that description. In looking at the cellular industry and comparing it to other industries and carriers that have been considered non-dominant in provision of interstate services (such as interstate giant MCI) it becomes clear that cellular

ESMR operators and the future licensing of additional PCS licensees.

In addition, the interstate component of service provided by cellular service providers is small both as a percentage of cellular subscribers' total usage and as a percentage of the interstate telecommunications market. overwhelming majority of cases interstate traffic is actually being hauled by an interexchange carrier rather than by the cellular service provider itself. Because of the current strictures of the MFJ, for BOC-affiliated cellular carriers the interstate traffic is necessarily hauled by interexchange carrier, except in those few areas where they have received MFJ relief or where a local service area crosses a state line.

IV. THE COMMISSION SHOULD REAFFIRM THE LOCAL NATURE OF CELLULAR SERVICE

SBMS further supports CTIA's Request for Rulemaking to clarify the local nature of cellular service. In particular, the Commission ought to address which services or functions need be tariffed in those instances in which the cellular service itself is purely intrastate but a carrier's customers are capable of placing interstate interLATA calls through the carrier's delivery of a call to the facilities of an interexchange carrier. Are cellular carriers in this circumstance required to file, in addition to interconnection tariffs, tariffs applicable to airtime charges that overlay the long distance phone call? Does the fact that these

airtime charges are identical for local and long distance charges alter the decision? Or, in the alternative, is it necessary for the carrier to qualify as a connecting carrier to avoid filing this schedule of charges? SBMS supports CTIA's request that the Commission clarify the parameters of connecting carriers, including within that definition, or as a permissible extension thereof, BOC cellular affiliates whose connection with an interexchange carrier is made, for example, at a tandem owned by its affiliated local exchange company. While such connections might not be strictly viewed as direct connections to an unaffiliated interexchange carrier, the BOC affiliates in many areas in fact provide the same type of service as the traditional connecting carrier and should e treated as such.

SBMS supports CTIA's interpretation of Section 221(b) that no interstate regulation can or should apply to local service in those states which could, if they chose, regulate cellular service even though the state has refrained from such regulation. SBMS submits that intraLATA cellular service or intraMSA/RSA service should qualify for this local exemption from the Commission's jurisdiction even though 1) a customer in those areas can place long distance calls by connecting to an interexchange carrier, or 2) there are incidental interstate elements to the cellular carrier service, including MSAs which encompass portions of more than one state.

SBMS further supports CTIA's request for clarification that roaming services provided by a carrier to foreign cellular subscribers, where offered on the same conditions as that offered to home subscribers, should be treated in the same manner as the home service rates, rather than as an interstate service.

V. STREAMLINED REGULATION IS APPROPRIATE FOR CELLULAR CARRIERS

Whether or not declared non-dominant, cellular carriers are appropriate candidates for maximum streamlining of regulation. To the extent that such carriers are required to file tariffs, cellular carrier's obligations to indicate schedules of rates should be fulfilled through the use of banded rates or maximum rate tariffs. The Commission does have authority under Section 203(b) of the Communications Act to allow for maximum minimum rates as a form of rate schedule for tariff purposes.

Cellular carriers should also be relieved of the cost support and notice period requirements for dominant carriers. Cellular carriers compete against each other and against resellers in pricing and promotions, customer service and all other aspects of cellular service. This Commission has repeatedly demonstrated its commitment to encouraging the benefits of competition, and has appropriately applied only minimal regulation to cellular carriers in the interest of promoting competition. Unlike the classic model of a regulated industry in which cost and pricing are public

because regulation operates as a substitute for competition, the competitive cellular industry does utilize competition as a check on rates. Revealing costs, giving advance notice of rate changes, and allowing one's competitors to attack those proposed changes serve to inhibit rather than enhance competition in such a competitive industry. The pre-filing of rate packages and supporting cost data will merely slow down, if not eliminate, the ability of the cellular carriers to make prompt competitive rate decisions. Pre-disclosure of new rates will have a negative effect on the ability, and therefore the incentive, of carriers to gain a competitive advantage over other carriers.

VI. CONCLUSION

Cellular carriers arguably are already eligible for treatment as non-dominant carriers, or for streamlined regulation regardless of their status, and the Commission could clarify their status as non-dominant carriers without the necessity for a formal rulemaking -- which SBMS encourages it to do. The Commission should, however, initiate a rulemaking to address and clarify the other concerns and issues raised by CTIA in its Petition, and may include, if the Commission deems it necessary, the question of classifying

cellular carriers as non-dominant and/or eligible for streamlined tariff regulation.

Respectfully submitted,

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Its Attorneys.

March 19, 1993

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing comments were served upon counsel for the petitioner CTIA by first class mail, postage prepaid, on the 18th day of March, 1993.

Juda M. Hood

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